Filed 6/2/09 P. v. Mallory CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>FRANK ROBERT MALLORY,<br>Defendant and Appellant. | G040461<br>(Super. Ct. No. 05NF2705)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, Supervising Attorney General, and Teresa Torreblanca, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Frank Robert Mallory of first degree murder (Pen. Code, § 187, subd. (a))[1] and found true the special circumstance the murder was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18)). The trial court sentenced him to life in prison without the possibility of parole.

Mallory argues the trial court was correct when it instructed the jury on the issue of voluntary intoxication as it related to the degrees of homicide but erred by failing to sua sponte modify and expand Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 625, "Voluntary Intoxication: Effects on Homicide Crimes," to include the intent necessary to prove the torture murder theory of first degree murder and the torture murder special circumstance allegation. He contends this error so severely limited the ability of the jury to consider evidence of his voluntary intoxication that it denied him due process of law. We disagree and affirm the judgment.

FACTS

On July 16, 2005, Mallory's brother, Patrick Mallory (Patrick), went to Mallory's residence. Patrick had been living with Mallory up until January or February 2004. When Patrick moved out, Patricia Dunthorne, Mallory's girlfriend, was living with Mallory. Patrick went to the residence to check on the property and to see if a Mercedes that Mallory had recently purchased was at the residence. While at the residence, Patrick went into the backyard and visited the dog he owned with his brother. The dog was excited to see him, and Patrick took the dog for a walk. After returning from the walk, Patrick went into the garage to put away the dog's leash. Upon entering the garage, he smelled an odor. While investigating the odor, Patrick picked up a pool float and discovered Dunthorne's body.

Patrick left the garage, went to a neighbor's house, and had the neighbor call 911. Patrick called his brother at work, let him know he had found a body in the

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

garage, and told him to come home. When Mallory arrived home, police advised him a body was found in his home. Straight faced and without expression, Mallory responded, "'That is news to me.'"

Forensic pathologist Dr. Joseph Halka performed an autopsy on Dunthorne's body. Based on the advanced stage of decomposition of the body and information he had received from the police, Dr. Halka estimated Dunthorne had been dead for two to four weeks. During the autopsy, Dr. Halka noted Dunthorne's tongue had been cut out with a very sharp instrument, inconsistent with a knife. He opined the cause of death was loss of blood caused by the excision of her tongue. Because the police advised him there was no blood found by the body, but a substantial amount of blood had saturated the mattress in the master bedroom, Dr. Halka believed the bed was the scene of the injury. Dr. Halka ruled out manual strangulation as a cause of death due to the intact hyoid bone and the significant amount of blood loss.

Adjusting for the effects of decomposition, Dr. Halka believed Dunthorne's blood-alcohol level at the time of death to be about .13 or .14. Additionally, a toxicology report revealed Dunthorne had a "stew of toxic substances" in her system at the time of her death.

Considerable testimony was offered on factors relevant to determining Dunthorne's date of death. Four neighbors testified regarding the last recollections they had of Dunthorne prior to the discovery of her body on July 16, 2005. David Yacono testified he lived next door to the Mallory residence on the east side. He had not seen Dunthorne for at least three or four weeks prior to July 16, 2005. Rosa Gutierrez testified she lived in the house on the other side of the Mallory residence. Rosa could not remember the last time she saw Dunthorne alive, but recalled hearing her voice about two and a half weeks prior to the police activity in July 2005. David Gutierrez testified he lived two houses to the west of the Mallory residence. David testified he recalled seeing Dunthorne maybe two weeks prior to the police activity. The last neighbor to testify was

Theresia Baier. She testified she lived three houses from the Mallory residence in the summer of 2005. Three to five days prior to June 28, 2005, during the night, she was awakened by the sound of a woman screaming. She "heard a woman scream three times, 'no, no, no.'" The sound came from the east side of her residence and from the direction of the Mallory residence.

Rose Tobin, Dunthorne's mother, testified she last spoke to Dunthorne on the telephone in mid-June 2005. Tobin always called Dunthorne on her cell phone. When Dunthorne did not answer her cell phone, Tobin would get a recorded message from her daughter advising she could leave a voicemail. In the later part of June and into July, Tobin attempted to reach her daughter on her cell phone, but she did not get an answer. Instead, she received a recorded message in Mallory's voice indicating Dunthorne was out of state, but if you left your name and number, she would return your call.

Danielle Hallett testified she worked as a patient coordinator for a plastic surgeon in the spring and summer of 2005, and Dunthorne was one of the surgeon's patients. Hallett had contacted Dunthorne regarding post-op care. The post-op care involved multiple appointments that were set up before the surgery. Dunthorne came to a couple of appointments and then missed an appointment. Hallett believed the missed appointment was on either the 23 or 24th of June. After the missed appointment, Hallett made repeated attempts to reach Dunthorne on both her home telephone and cell phone. She was never able to reach Dunthorne but ultimately spoke with Mallory on the telephone. Mallory indicated Dunthorne was sleeping and in a lot of pain, but she would call back when she woke up, but Dunthorne never called back. Hallett kept calling to set up follow-up appointments. She was never able to speak with Dunthorne, but Mallory made appointments for Dunthorne. However, Dunthorne never showed up for any appointment Mallory made for her.

The only other witness to testify to factors relevant to determining Dunthorne's date of death was Glendon Aaron. The parties stipulated that in the summer of 2005, Mallory was serving a sentence under house arrest for a conviction for driving under the influence of prescription drugs. Under his probation terms, Mallory was allowed to go to and from work and medical appointments and could be up to 1000 feet from his home. In order to get to work, Mallory hired Aaron to drive him. Aaron testified he drove Mallory for about three weeks and then he understood Dunthorne would be driving Mallory back and forth to work. About two weeks after Aaron had ceased driving Mallory, he got a call from Mallory on a Sunday night. Mallory asked if Aaron could resume driving him to and from work. Aaron agreed and said he would be there the next morning. Monday morning Mallory called and said he was not feeling well. It was not until Wednesday that Mallory again had Aaron drive him. In mid-July, the driving arrangement ended when Aaron arrived at the Mallory residence and was contacted by the police.

The prosecutor offered evidence discovered by the police during a search of Mallory's evidence. On a nightstand in the master bedroom, police found a pair of pliers and some heavy metal industrial-type scissors. Police also found a yellow spiral-bound notebook containing dated journal entries. The journal entries began on February 18, 2004, and ended on July 8, 2005. A number of journal entries appeared to be entered after Dunthorne had died, but they were written in such a way as to suggest she was still alive.

The only witness called by the defense was Mallory. Mallory testified he had never been married and had never been involved in a serious relationship with a woman until his relationship with Dunthorne. Mallory and Dunthorne met at an Alcoholics Anonymous (AA) meeting. Mallory was attending AA meetings as a condition of a driving under the influence conviction. Mallory also admitted he had an addiction to codeine and Valium and was attending AA meetings because it helped him

stay clean. According to Mallory, Dunthorne had both a drinking problem and a problem with pain medication. Within a short time after meeting Mallory, Dunthorne moved in with him and they commenced a romantic relationship.

The relationship between Mallory and Dunthorne became acrimonious, and they would argue a couple of times a week. Dunthorne would belittle Mallory in bed and tell him he was useless. While under the influence of various drugs, Dunthorne would hit Mallory, but Mallory claimed to never have hit her back. On a couple of occasions, Dunthorne had called the police and attempted to have Mallory arrested based on the arguments. Mallory came home one day and found Dunthorne with a loaded shotgun. She asked Mallory to help her commit suicide, but he refused. Initially, he feared for his own life, but eventually, Dunthorne gave him the gun without further incident.

Mallory admitted he had killed Dunthorne one night in June, but he did not remember all the details of how the killing occurred. He recalled that night Dunthorne had taken codeine, Valium, Xanax, and Zoloft. She also had consumed a full bottle of wine. Mallory had taken four Vicodin pills because he had seven teeth pulled the week before, and he was in pain. At approximately 8:00 o'clock in the evening he and Dunthorne went to bed. Prior to retiring, Dunthorne had been complaining Mallory had not purchased an expensive watch for her, and he had advised her he had no intention of buying it for her. She then began belittling him, and she hit him. Before he fell asleep, Mallory recalled being angry. When he awakened and got up about 10:00 o'clock that evening, Mallory testified he was "still feeling the medication." He recounted he walked around to Dunthorne's side of the bed. He recalled being upset, getting on top of her, putting his hands on her throat, and strangling her. She did not respond and he presumed she was already dead as a result of the ingestion of drugs and alcohol. He then went back to sleep and did not awaken until roughly 4:30 or 5:00 in the morning.

When Mallory woke up, Dunthorne was lying next to him in bed. He left for work, and when he returned that evening, he observed Dunthorne was still in the bed.

Dunthorne was not moving, and he became panicky about what had happened the night before. His only recollection was of him strangling Dunthorne. Mallory left Dunthorne in bed for three days. During that time, Mallory slept in the bed with Dunthorne's body. On the fourth day, he put on a pair of work gloves and moved the body to the garage and left it there for some period of time. Eventually, Mallory decided that after he finished his term of house arrest, he would place the body in a sleeping bag and take it out to the desert and bury it.

Mallory admitted there was "plenty" of blood on the mattress when he woke up. He tried to clean the blood off the mattress because he was "panicky, scared, [and] freaking out." Mallory claimed he had no knowledge as to the removal of Dunthorne's tongue.

On the issue of Mallory's intoxication, the court instructed the jury with CALCRIM No. 625 as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider the evidence of voluntary intoxication for any other purpose."

Mallory did not request the court modify CALCRIM No. 625, but he did request the court instruct the jury with CALCRIM No. 626, "Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes."[2] The prosecution objected to

[2] CALCRIM No. 626 reads: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could

the court giving this instruction. The prosecution noted the only evidence of any intoxication came from Mallory during his testimony. The prosecution also argued none of Mallory's acts demonstrated a lack of awareness. The prosecution explained that by Mallory's own account, he ingested the Vicodin three to three and one-half hours before the strangulation occurred. Mallory argued his lack of memory of all of the circumstances surrounding Dunthorne's death indicated he was ambulatory but unconscious as a result of voluntary intoxication at the time he cut out Dunthorne's tongue.[3] The defense relied on Mallory's history of driving under the influence of drugs to support its theory he could have been unconscious due to drug ingestion but still function. Because Mallory recalled strangling Dunthorne but did not remember cutting out her tongue, the defense argued he must have been unconscious at the time the latter injury was inflicted. Mallory asserted there was no way of knowing when the Vicodin had dissolved in his system. Accordingly, he claimed the jury should be allowed to decide the impact, if any, of the medication he had ingested. In refusing to give CALCRIM No. 626, the trial court reasoned unconsciousness was not a reasonable

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produce an intoxication effect, or willingly assuming the risk of that effect. [¶] When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. [¶] Involuntary manslaughter has been proved if you find beyond a reasonable doubt that: 1. The defendant killed without legal justification or excuse; 2. The defendant did not act with the intent to kill; 3. The defendant did not act with a conscious disregard for human life; AND 4. As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter."

[3] Although the record reflects defense counsel said involuntary intoxication, we presume he misspoke and meant to say voluntary intoxication.

inference that could be drawn from the evidence. The defense was simply asking the jury to speculate.

DISCUSSION

Mallory contends the trial court erred by failing to instruct the jury it could consider his voluntary intoxication in deciding whether he acted with the intent necessary to prove the torture murder theory of first degree murder and the torture murder special circumstance allegation. Mallory does not maintain he requested the court modify CALCRIM No. 625.[4] Rather, he quotes the use notes[5] for CALCRIM No. 625 and appears to suggest the court had a sua sponte duty to modify the instruction to include references to mental states.

It is well settled that absent substantial evidence of voluntary intoxication, the court is not required to instruct the jury with CALCRIM No. 625. "[A] defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent."' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on other grounds in *People v. Doolin* (2009)

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[4] In the trial court, the defense attempted to present an unconsciousness defense. Accordingly, it asserted the trial court must give CALCRIM No. 626 but did not request any modification of CALCRIM No. 625. Mallory does not raise the issue of the court's refusal to give CALCRIM No. 626 on appeal. Generally, a defendant may not raise a new issue on appeal and, therefore, Mallory forfeits this issue. But to forestall an inevitable habeas corpus petition alleging ineffective assistance of counsel, we will consider the merits of his claim concerning CALCRIM No. 625. (See *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156, 1158.)

[5] Jury instructions, even use notes, do not constitute legal authority binding on a trial court. (See *People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) But we will consider the cases cited within the use note.

45 Cal.4th 390, 421, fn. 22.) A voluntary intoxication instruction is warranted "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677.) A trial court has a sua sponte duty to "instruct on the 'principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles"'" that are irrelevant and may confuse the jury. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1172.)

In light of these legal principles, we must review the evidence of intoxication to determine whether the trial court erred in failing to sua sponte modify the instruction to include references to additional mental states. Mallory testified the night he killed Dunthorne, he had taken four Vicodin. He also testified that at the time he strangled Dunthorne, he was "still feeling the medication." This, and evidence of a prior conviction for driving under the influence of drugs, was the sum total of evidence on the issue of intoxication. Prior to the statutory elimination of the defense, our Supreme Court addressed the modicum of intoxication evidence necessary to require a diminished capacity instruction. "Normally, merely showing that the defendant had consumed alcohol or used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on diminished capacity. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241 (*Pensinger*).) We find *Pensinger* instructive.

In *Pensinger, supra*, 52 Cal.3d 1210, 1229, defendant was convicted of first degree murder, and the jury found true the special circumstance allegations the murder was committed in the course of a kidnapping, and the murder was intentional and involved the infliction of torture. The Supreme Court reversed the torture-murder special-circumstance finding because the trial court failed to instruct the jury that it must find intent to inflict torture. (*Id.* at pp. 1242-1243.) But the court concluded the trial court did not err in failing to instruct sua sponte on diminished capacity because there

was insufficient evidence to warrant the instruction. The court noted all the witnesses declared defendant did not seem intoxicated and the consumption of alcohol was relatively moderate. The court determined this evidence, and the lack of evidence from independent witnesses or from defendant's trial testimony that he may have been intoxicated, did not amount to substantial evidence defendant lacked the capacity to form the requisite mental state such that a diminished capacity instruction was required. (*Ibid*.)

We find similarity in the facts before us. There were no witnesses who testified Mallory seemed intoxicated. It is impossible to determine from the record whether the consumption of four Vicodin hours before the killing would result in any significant degree of impairment because no expert testimony was offered on this point. (*People v. Horton* (1995) 11 Cal.4th 1068, 1119 [insufficient evidence for intoxication instructions where defendant did not present any evidence of effect of cocaine on ability to form requisite intents].) Mallory's vague and self-serving testimony he was "feeling the effects" of the Vicodin when he strangled Dunthorne and his assertion he had no memory of inflicting the fatal wound is of little help to a jury attempting to determine Mallory's mental state. The defense merely provided evidence Mallory had consumed Vicodin and was feeling some effect of the drug. We conclude there was insufficient evidence to require the court to sua sponte modify CALCRIM No. 625.

We are mindful, in giving the version of CALCRIM No. 625 it did, the trial court implicitly determined substantial evidence existed to warrant an intoxication instruction. But an appellate court does not defer to the trial court's rulings and findings related to jury instructions. Instead, "[w]e apply the independent or de novo standard of review . . . ." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) In determining de novo whether substantial evidence supports an instruction, we do not weigh the relevant evidence, we simply determine whether it is legally sufficient. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

## DISPOSITION

The judgment is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.